TAN JING JEONG

v.

ALLIANZ LIFE INSURANCE MALAYSIA BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABANG ISKANDAR J
[SUIT NO: D7-22-1281-2006]
23 JUNE 2010

INSURANCE: *Duty of disclosure - Contracts uberrima fides - Effect of misrepresentation and non-disclosure of material facts - Misrepresentation by insurer and agent regarding payment features of life insurance policy - Duty on insurer and agent to make full disclosure of material facts - Duty on insurer and agent not to misrepresent about features of policy - Duty of insurer to ensure that potential contract fits needs and benefits of insured - Whether policy can be avoided by insured due to non-disclosure - Whether payment made can be recovered on the ground of mistake of fact - Whether insured estopped from avoiding policy*

CONTRACT: *Misrepresentation - False representation - Whether fraud must be perpetrated by representor to amount to misrepresentation - Contracts Act 1950, s. 18*

In 2004, the plaintiff had bought a life insurance policy known as the 'Investpro' from the first defendant ('D1') through one of its agents, the second defendant ('D2'). The premium payable on the policy was RM400,000 per annum. It was provided that 45% of the premium of RM400,000 which had translated to RM180,000 was earmarked for investment-linked fund. The plaintiff paid the first year premium in full and he had expected a reasonable return from his investment besides providing him the intended insurance cover. However, on 27 February 2006 the plaintiff was notified by D1 that the investment-linked fund total account value of the policy had, by 31 December 2005 dwindled to RM19,024.48 from the initial figure of RM180,000. Besides that, *via* a notice dated 7 December 2005, D1 issued the plaintiff with a Premium Due Notice requiring him to pay the premium for the next policy year in the sum of RM400,000. The plaintiff then sued D1 and D2 for having sold to him the Investpro policy by way of misrepresenting to him about it, as well as by way of non-disclosure of material fact policy in their possession regarding the feature of the Investpro which would have impacted on his decision whether to

buy the Investpro policy. Thus, the plaintiff claimed that he was entitled to rescind the contract and seek a refund of the premium that he had paid. He also claimed for general damages. The main issues arising to be determined were: (i) was there misrepresentation or material non-disclosure by D2 with respect to the features of the Investpro policy; (ii) was there a duty on the defendants to disclose on the use of the balance 55% of the premium paid by the plaintiff; (iii) was the Investpro policy a contract made in utmost good faith and requiring full disclosure by both parties; and (iv) if it was, was it a voidable contract at the instance of the plaintiff, and if so, was the plaintiff estopped from avoiding it?

Held (allowing the plaintiff's claim with costs):

(1) Under s. 18 of the Contracts Act 1950, there is no need for there to be fraud perpetrated by the representor, with regard to the giving of the advice by the agent (D2) to the plaintiff, for the representation to amount to a misrepresentation. It is the intent of the representor that is crucial. (para 10)

(2) D2 did represent to the plaintiff that a one-time payment premium of RM400,000 was sufficient to cover for the rest of the premiums throughout the subsequent years in relation to the Investpro policy. This feature of the policy was the most important factor that persuaded the plaintiff into agreeing to purchase the policy from D1 and D2. The plaintiff was convinced by D2's advice to him. (para 14)

(3) D2 had induced and misled the plaintiff into purchasing the Investpro policy. D2 had the positive duty not to misrepresent to the plaintiff about the fact that the returns from the investments would be sufficient to cover for the premiums payable for the subsequent years of the Investpro policy. D2 also did not inform the plaintiff that the balance 55% of the premium would be used to pay for the costs of administrative charges. No such mention was also expressly made in the policy itself. (paras 15 & 16)

(4) The fact that insurance contracts are in the nature of *uberrima fides* had placed the duty of utmost good faith on both parties, with equal force. All parties to an insurance contract must deal in good faith, making a full declaration of all material facts in the insurance proposal. Thus the insured must reveal the exact

nature and potential of the risks that he transfers to the insurer, while at the same time the insurer must make sure that the potential contract fits the needs of, and benefits, the assured. (para 20)

(5) Once a positive duty is imposed on a party by law to be truthful, including to disclose the material fact, that duty is not discharged simply on account of the fact that the other party failed to inquire about some material fact that has not been disclosed, but which fact was within the knowledge of the party having such knowledge. (para 26)

(6) The effect of non-disclosure of a material fact in an insurance contract is exactly the same as that of a misrepresentation and it justifies the aggrieved party to avoid the contract; *Asia Insurance Co Ltd v. Tat Hong Plant Leasing Pte Ltd* (ref'd). (paras 27 & 28)

(7) The plaintiff was not estopped from avoiding the said contract. Nothing could be adversely attributed to the plaintiff such that he ought to be estopped from avoiding the Investpro contract. (para 31)

Case(s) referred to:

Asia Insurance Co Ltd v. Tat Hong Plant Leasing Pte Ltd [1992] 1 CLJ 330; [1992] 4 CLJ (Rep) 324 HC ***(refd)***

Carter v. Boehm [1766] 97 ER 1162 ***(refd)***

Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors [2006] 1 CLJ 1 CA ***(refd)***

Travelsight (M) Sdn Bhd & Anor v. Atlas Corporation Sdn Bhd [2003] 6 CLJ 344 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 18, 76

Other source(s) referred to:

Chitty on Contracts, 30th edn, vol II, p 1290

Halsbury's Laws of England, 4th edn, 2003 Reissue, vol 25, p 36

Peter Eggers & Patrick Foss, *Good Faith and Insurance Contracts,* 71 & n22 (1998)

For the plaintiff - G Rajasingam (Teh Lay Kheng & Daphne Khoo with him); M/s Shearn Delamore & Co

For the defendants - Ranjit Singh Harbinder Singh (KT Ho with him); M/s Gan, Ho & Razlan Hadri

Reported by Amutha Suppayah

JUDGMENT

Abang Iskandar J:

[1] At the end of 2004, Mr Tan Jing Jeong ('TJJ') had bought an insurance policy from the Allianz Life Insurance Malaysia Berhad ('the defendant insurance company'-D1), through one of its agents by the name of Mr Ong Tuan Soon (OTS-D2). The insurance product was a Life Policy known as the 'Investpro'. It was undisputed that, among others, the terms of the Investro policy had included the following:

(a) the premium of the policy was RM400,000 per annum;

(b) that the life insurance coverage was RM8 million;

(c) the total and permanent disability coverage was RM1 million;

(d) that the monthly service charges was RM3; and

(e) the fund management charge was 1.5% p.a.

[2] This product was in the nature of an investment-linked insurance policy and as such a certain portion of the premium was allocated for investment-linked fund for the purpose of yielding returns from the investment. In fact, it was provided that 45% of the premium of RM400,000 which had translated to RM180,000, was earmarked for that very purpose.

[3] TJJ had paid the first year premium for this Investpro insurance product in full and he had expected a reasonable return from his investment in the Investpro policy, besides providing him the intended insurance cover, which OTS had sold to him.

[4] However, on 27 February 2006, TJJ was notified by the defendant insurance company (D1) that the investment-linked fund total account value of the policy had, by 31 December 2005 dwindled to RM19,024.48 from the initial figure of RM180,000. Besides that, *via* a notice dated 7 December 2005, the same insurance company had issued TJJ with a Premium Due Notice requiring him to pay the premium for the next policy year in the sum of RM400,000.

[5] As it had unfolded before this court, TJJ ('the plaintiff') had sued the insurance company ('the D1') and OTS ('the D2') for having sold to him the Investpro policy by way of misrepresenting to him about it, as well as by way of non-disclosure of material

fact policy in their possession regarding the feature of the Investpro which, it was alleged by the plaintiff, they ought to have disclosed to him, as it would have impacted on his decision whether to buy the Investpro policy or not, in the first place. As a result, the plaintiff claimed that he was entitled to rescind what was actually a voidable contract at his instance and for a refund of the premium that he had paid to the defendants with respect to the Investpro policy. He had also claimed for general damages to be assessed,; with interest and costs against both the defendants (D1 and D2).

[6] A number of contentious issues had been raised by both parties in this litigation, the determination of which would resolve this case one way or the other and they were contained in bundle marked as 'D'.

The salient issues may be postulated as follows:

(a) Was there misrepresentation or material non-disclosure by D2 with respect to the features of the Investpro policy?

(b) Was there a duty on the Defendants to disclose on the use of the balance 55% of the premium paid by the plaintiff as premium for the policy?

(c) Was the Investpro policy a contract made in utmost good faith and requiring full disclosure by both parties?

(d) If it was, was it a voidable contract at the instance of the plaintiff? If so, was the plaintiff estopped from avoiding it?

[7] In this case, the plaintiff had alleged two main issues raised against both the defendants, namely misrepresentation and non-disclosure of material facts to him on their part. The misrepresentations are with respect to one time premium payment and the non-disclosure of a material fact that had been concerned with the use of the 55% balance of the premium paid by the plaintiff to the D1. It has been the plaintiff's pleaded case that these two alleged circumstances had misled him into purchasing the Investpro policy from D2. On account of those allegations, the plaintiff believed that the contract between him and the D1 was a voidable contract and that under the circumstances he was entitled to rescind it and be refunded of the premium that he had paid to the defendants for the purchase of the Investpro policy if

not for those alleged misrepresentations and/or non-disclosure. Section 76 of the Contracts Act 1950 was cited as a basis in that regard by the plaintiff.

[8] Both the defendants had denied the plaintiff's allegations and had put him to strict proof thereof. The defendants had averred that while the D2 may have advised the plaintiff on the Investpro policy, in the final analysis, it was the plaintiff's sole and ultimate decision whether to purchase the said policy or not. It was put forth by the defendants that the plaintiff's action against them had been actuated by the fact that the plaintiff could not accept the fact that his investment in the Investment policy had not yielded to him satisfactory returns as anticipated by him.

[9] Each of the parties before this court had forwarded its own version of what had transpired in this court through their respective witnesses. As is trite in a civil litigation, one who alleges a fact has the burden to prove the existence of that alleged fact, on the threshold determined by law to be that on the balance of probabilities. Put simply, at the end of the day, the party whose evidence proved to be the more probable than the other, having taken into consideration the issue of credibility of the witnesses, would eventually prevail and secure a judgement in his favour.

The Misrepresentation

[10] Now, as regards the alleged misrepresentation, was there really misrepresentation? If indeed there had been, did the D2 make it to the plaintiff? If so, did the said misrepresentation influence the plaintiff into making the decision to purchase from D2 the Investpro policy that had turned into what the plaintiff had described as a total failure and a fiasco, as an investment. In short, the plaintiff was saying that granted that the final decision rested with him in purchasing the Investpro policy and admittedly so, however, if the advice from the D2 as an undisputed agent of the D1 was tainted in the sense that it was less than wholly honest in its contents, then his ultimate decision to purchase or not to purchase the Investpro policy that was based on that advice can hardly be termed as having been fairly arrived at by him. The Contracts Act 1950 has defined 'misrepresentation' as follows: Section 18 "Misrepresentation" includes:

(a) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(b) Any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and

(c) Causing, however innocently, a party to an agreement to make mistake as to the substance of the thing which is the subject of the agreement.

In fact and in law, there is no need for there to be fraud perpetrated by the representor, with regard to the giving of the advice by the agent (D2) to the plaintiff, for the representation to amount to a misrepresentation. It is the intent on the part of the representor that is crucial. The court in the case of *Travelsight (M) Sdn Bhd & Anor v. Atlas Corporation Sdn Bhd* [2003] 6 CLJ 344 (PTAB2), had at p. 352 given an insight to the definition of misrepresentation as follows:

> … a misrepresentation is a representation that is untrue. It is a false statement made by one party to the contract to the other, before, or at the time of, contracting, on which that other party relied in contracting. If the representor falsely states his intention, then he has falsely misrepresented the fact.

[11] From the evidence as led in this court, it cannot be disputed that the D2 did make the representation about the returns of investments based on the D1's past performance, and that the returns would be sufficient to cover the plaintiff's subsequent yearly premium for the policy. The D2 and the plaintiff have known each other for about three decades and their family members also knew each other. Indeed, D2 had even invited the plaintiff to one of his children's wedding. They used to be colleagues during their time with Morgate. Though they had since gone their separate ways in pursuit of their respective careers, they still crossed each other's path again when D2, as an agent of Asia Life, an insurance company, had sold the plaintiff three general life policies totalling coverage of about RM6 million. Those policies had served the plaintiff well and returns from them were reasonable. All these are not disputed facts. The D2 had since left Asia Life and had become an agent of Allianz Life Insurance Malaysia Berhad, the D1 in our present case. So, he had admittedly

A approached the plaintiff with a view of selling to him the Investpro policy with a coverage of RM8 million at yearly premium of RM400K for 45 years.

[12] What had allegedly transpired between them as claimed by each of them prior to the eventual purchase by the plaintiff of the B Investpro policy from D2, had become the central point for consideration by this court.

[13] It is my finding that the D2 did in all probabilities represent to the plaintiff that the D1 had a good track record of investment C returns. To my mind, the D2 was expected to do promote D1's product(s), as an agent of the latter. But in doing so, the agent would not be expected to go overboard. In this case, the D2 had shown to the plaintiff the sales illustrations which had shown the performance of the D1 over a number of years. It would be highly D improbable for the D2 to have been able to convince the plaintiff to surrender one of the latter's Asia Life policies without projecting D1's good track record. He knew that the plaintiff was a highly successful businessman in his own right and it was not the case then that Asia Life was giving the plaintiff very low returns. On E the contrary, the Asia Life policy's returns had been, in the words of the plaintiff, reasonable to say the least and this factual averment by the plaintiff was not disputed. The D2 must have indicated to the plaintiff a return projection on the Investpro policy investment that was better than the Asia Life policy that F the plaintiff was then holding.

[14] It is my finding that the D2 did represent to the plaintiff that a one-time payment premium of RM400K was sufficient to cover for the rest of the premiums throughout the subsequent G years in relation to the Investpro policy. In fact, this feature of the policy can be said as the most important factor that had persuaded the plaintiff into agreeing to purchase the Investpro policy from D1 and D2. The plaintiff was convinced by the D2's advice to him and this fact was not denied by the D2 when he H was asked in cross-examination by learned counsel for the plaintiff at XXD155, like so:

> Do you agree that whilst the Plaintiff made his decision to purchase the Investpro policy, is it plausible (possible) that he I would have considered your advice and recommendation concerning the Investpro policy?
>
> A: Yes.

[15] The plaintiff was convinced by D2's explanation that the returns from the investments from the allocated 45% of the RM400,000 would be sufficient to cover the premiums of subsequent years of the policy based on the sales illustrations at p. 80 of bundle E. As they were friends for a long time and the fact that D2 had been the plaintiff's agent for the Asia Life policies, he did not have any reason to be suspicious. In fact, the plaintiff's understanding of the policy was confirmed by the Head of Operation of D1('the HOP') when the HOP in responding to the plaintiff's letter of query, had said: "You also correctly described this mechanism in your letter when you detail that the 'income generated from (the fund) will be sufficient to cover my annual premium for the RM8 million …" As it had turned out, the investment relating to the RM180K was so bad that only a paltry sum was left in it. In fact, the remaining sum was stated as RM19,024.84. At about the same time, the D1 had sent to the plaintiff a notice for him to pay up the next year premium of RM400K for the said Investpro policy. That had broken the proverbial camel's back, as far as the plaintiff was concerned. Contrary to what was told to him by the D2 regarding the Investpro policy, he was required to pay annual premium of RM400K. The plaintiff had therefore complained that D2 had induced and misled him into purchasing the Investpro policy. Having looked at the evidence, I agree that his complaint was valid and that he had established on the balance of probability that such was the case. The D2 had the positive duty not to misrepresent to the plaintiff about the fact that the returns from the investments would be sufficient to cover for the premiums payable for the subsequent years of the Investpro policy.

The Non-Disclosure

[16] It is my finding too, that D2 did not represent to the plaintiff that 55% of the initial premium sum of RM400,000 would be used to account for the administrative charges. Looking at the evidence, it was more probable than not, that the D2 did not inform the plaintiff that the balance 55% of the premium would be used to pay for the costs of the administrative charges. Looking at the policy itself, no such mention was made expressly to that effect. The oral evidence of the witnesses from both sides of the litigating divide in this case had admitted that the material documents relating to this policy did not carry such information

readily for the information of the plaintiff. Even the sales illustration plan of the D1 used by D2 to explain the salient features of the policy with respect to its investment returns did not carry with it any stipulation to the effect that 55% of the Investpro policy premium would go towards paying for the D1's 'product and acquisition expenses.' In this instance case before this court, it was rather telling when D2 (as SD3) himself testified on the issue of the balance 55% when cross-examined at question XXD213 by the learned counsel for the plaintiff, like so:

> Q. When you sold the Investpro policy to the Plaintiff, were you aware that the balance 55% of the RM400K premium will be used by the 1st Defendant to pay for its product and acquisition expenses?
>
> A. Yes

[17] Yet, he did not inform the plaintiff of that material fact to the plaintiff who was then a potential buyer of the very same policy from him and who had to surrender, on D2's advice, one of his Asia Life insurance policies in order to finance the purchase of the Investpro policy. This evidence had come from the D2 during cross-examination of D2 by learned counsel for the plaintiff at question XXD222 in the course of trial and it had transpired in the following manner:

> Q. Did you tell the Plaintiff before he purchased the Investpro policy that the RM220K of his RM400K would be deducted right at the outset by the 1st Defendant to pay for the D1's product and acquisition expenses?
>
> A: No.

[18] This omission by the D1, through D2, to disclose the factual circumstances pertaining to the 55% deduction had gone against the grain, especially when even SD1, Ms Pua, had agreed about the Bank Negara's concerns as expressed in P9 on the need for sale of insurance products to be transparent so that potential purchasers would be better advised before deciding to buy an insurance policy, the Investpro policy included. When SD1 was asked by learned counsel for the plaintiff at XXD104, to show to this court where in the Investpro policy the 55% deductions would be made for administration charges, she had answered in the following manner:

A. In the policy we will not mention that the RM220,000 or 55% will be used to cover product and acquisition expenses but we stated clearly the first year allocation is 45% from the total premium for the units.

[19] To my mind, SD1 ought to have just stopped in her answer after saying that D1 'will not mention that the RM220,000 or 55% deductions will be used to cover product and acquisition expenses' as that would have served its purpose in answering the question posed to her. But, she had gone further by stating that 'but we stated clearly the first year allocation is 45% from the total premium for the units.' This court could not fathom the reason for SD1 to add that quoted phrase to her answer because as it stood, it did not in any way explain what had happened to the balance 55% of the total premium paid. If anything, that statement by SD1 only served to beg question as to what would happen to the said balance 55%. By merely saying, *albeit* 'clearly', that 'the first year allocation is 45% from the total premium for the units' did not assist in explaining away what had happened to the balance 55%. As earlier alluded to by me, it only begged a question rather than provide ready answer to the question posed to her. When she was pressed further on this issue by learned counsel for the plaintiff, she had answered, "Not direct, but indirectly, yes." After observing this witness in the witness stand and in the light of her many answers, I have found her to be a rather evasive witness and had not been frank and forthcoming in her testimony before this court. The above quoted excerpts from her evidence would illustrate my observation of her as a witness in this case. And then, there was the evidence of SD2 on this same issue relating to the 55% deductions. It is interesting to note that this witness was a team member of the D1 which had designed this Investpro policy for D1 to offer to the purchasing members of public. SD2 was an actuary with D1, whose function has been defined in Webster's Third New International Dictionary as a person trained in mathematics and statistics whose business it is to calculate insurance and annuity premiums, reserves and dividends. It was rather telling when he had answered to the effect that he agreed with learned counsel for the plaintiff that D1 ought to have disclosed to the plaintiff about the use of the substantial 55% deductions and that such 55% deductions 'is a significant fact to be disclosed to the plaintiff before the plaintiff makes an informed decision to purchase the policy.' When SD2

A was re-examined by the learned counsel for the defendants on his above answers given by him during cross-examination, SD2 had said that as a purchaser, he would want to know where the 55% would go to. To the mind of this court, that admission by SD2 was telling indeed.

B

[20] The fact that the administrative charges had taken away 55% of the premium sum had surely made it into a material fact that must have sizeable impact on the decision making process on the part of the plaintiff when considering whether to purchase the C Investpro policy or otherwise. In the words of the plaintiff himself at XXX49, he had said: "I was a business man for many years. I would never have bought any insurance policy if I were told 55% of my upfront premium would be gone with a stroke of pen. I would never buy this sort of product". To my mind, that fact D relating to the 55% of the premium going to defray administrative charges is, under the circumstances of this case, a material fact. The fact that insurance contracts, is in the nature of an *uberrima fides,* has placed the duty of utmost good faith on both parties, with equal force. Departing from there, the question that needed E to be answered first would be whether the Invespro policy in this case is an *uberrima fides* kind of contract. *Uberrima fides* is a Latin terminology which literally means most abundant faith. The duty of utmost good faith has a uniquely distinguished pedigree. The essential role of good faith in law was embraced by the Athenians F (as 'epieikeia') and later by the Romans (as 'aequitas') and those concepts were later developed into a concept what has become known as 'equity' under the English general common law and subsequently they had given rise to the specific reciprocal obligation owed between insurers and the insureds known as G *uberrima fides* (see generally J.F. O'Connor, *Good Faith in English Law 2* (1990)) Of course, the earliest records of insurance contracts have been found in the archives of Genoa and Florence in the year 1523 where they were identified with risks in sale or loan contracts, particularly as regards carriage by sea. (see Peter H Eggers & Patrick Foss, *Good Faith and Insurance Contracts*, 71 & n.22 (1998)).

[21] So, it is now commonly accepted as the basis for the legal doctrine which governs the insurance contracts. This means that all parties to an insurance contract must deal in good faith, making I a full declaration of all material facts in the insurance proposal.

Thus the insured must reveal the exact nature and potential of the risks that he transfers to the insurer, while at the same time the insurer must make sure that the potential contract fits the needs of, and benefits, the assured.

[22] A higher duty is exacted from parties to an insurance contract than from parties to most other contracts in order to ensure the disclosure of all material facts so that the contract may accurately reflect the actual risk being undertaken. The principles underlying this rule were stated by Lord Mansfield in the leading and often quoted case of *Carter v. Boehm* [1766] 97 ER 1162, 1164, as follows:

> Insurance is a contract of speculation ... The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist ... Good faith forbids **either** party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary. (emphasis added)

[23] Looking at the law and the evidence before this court, it is my finding that the contract of insurance that was entered into between the plaintiff on one side and the D1 on the other was, for all intent and purposes a contract that involved *uberrima fides* on both sides. There is therefore a duty on both sides to disclose facts which must be regarded as being material which they both have to consider before they decide to commit themselves to be bound by the contract. To my mind, the Investpro policy is one such contract which the law would require full disclosure of all material facts.

[24] In the case of *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1 CA, learned Justice Gopal Sri Ram JCA (as he then was) had said at p. 19 in the report as follows: "It is settled beyond dispute that a contract of insurance is one that imposes a mutual duty on the parties to it to act *uberrimae fides* towards each other. Whether a particular fact is a material act is a question of fact ... But the duty to make full disclosure of all material fact is not an implied term of a contract of insurance. There is in fact no contract at the point at which the

duty arises; the parties being still at the stage of negotiations. It is therefore a pre-contractual duty imposed by the common law. I take these propositions to be settled by authority."

[25] In this case, I find that the defendants were under a duty to disclose all material facts known to them, to the plaintiff before the Investpro contract was entered into. By the very nature of the insurance contract, of which the Investpro policy is one, the duty to disclose all material facts is imposed on both sides to the contract. Apart from the case cited above where learned Justice Gopal Sri Ram JCA (as he then was) had alluded to the mutual duty on both sides to observe the utmost good faith principle, it has been stated by *Halsbury's Law of England* 4th edn 2003 Reissue vol 25 at p. 36, as follows: "Requirement of the utmost good faith. A contract of insurance is a contract based on the utmost good faith, and if the utmost of good faith is not *observed by either party* the contract may be avoided by the other party. This principle is of universal application to all types of insurance contract. The utmost good faith imposes *positive obligation of disclosure*. In its practical application the principle permits either party to avoid the contract altogether if it is established against the other party that: (1) there has been a failure by the other party to disclose material fact; or (2) the other party has made an innocent misrepresentation of a material fact, since statements made in a contract must be true in fact." Now, nothing can be more clear than that in stating the essence of an insurance contract. Both parties bear the same duty to be frank and truthful upfront. If by reason either of non-disclosure of a material fact or a misrepresentation of a material fact, although *an innocent one,* such contract becomes voidable at the instance of the party who had suffered by reason of the failure of the other party to observe its attendant duty to be faithfully truthful. As was rightly cited by learned counsel for the plaintiff before this court, in the case of *National Insurance Co Ltd*, it was held that, "Good faith forbids *either party concealing what it privately knows, to draw the other into a bargain,* from his ignorance of that fact, and his believing the contrary." (emphasis added). In this case, the D1 had created the Investpro policy as a product that was offered to the general public and it had decided not to disclose upfront what the use of the balance 55% of the premium would be for. Now, that portion consisted of more than half of the total premium paid by the plaintiff for the policy. To my mind, that was a material fact that

the defendants were obliged to positively disclose to the plaintiff. Even SD2, one of the members of the team of D1 which designed the Investpro policy admitted in this court that as a customer, he would want to know where the 55% of the premium would go to before he decided to purchase the same. In this case, as the plaintiff was not informed by D2 of the use of the 55% of the premium was to be used for administrative charges by D1, he was in the position, which the learned authors in *Chitty on Contracts*, 30th edn, vol. II at p. 1290, had described as an aggrieved party. The learned authors went on to elaborate on the implications that could ensue in such a circumstance as follows: "... However, the aggrieved party will not have affirmed the contract and lost his right to avoid unless he has knowledge both of the facts concerning the non-disclosure or misrepresentation and of his resulting right to avoid, constructive knowledge or *being put on inquiry is not sufficient*." (emphasis added). In the context of this case before this court, as there was a failure on the part of D2 and/or D1 to disclose to the plaintiff on the use of the balance 55% of the premium for the Investpro policy, the '15-day free-look' policy could not come to the assistance of the defendants, as the policy document, as admitted to by the D1's witnesses, did not have printed on it the matter concerning the use of the 55% being the balance of the premium for the Investpro policy. Even if the plaintiff were to look for it in the policy document, he would not have been able to find anything on it. As SD2 had said, it was never the intention of the D1 to put into the policy the matter concerning the balance 55% of the premium for the Investpro policy.

[26] It is my finding that the plaintiff would not have been able to discover the purported administration charges imposed by the D1 on his own from the policy. To my mind, once a positive duty is imposed on a party by law to be truthful, including to disclose the material fact, that duty is not discharged simply on account of the fact that the other party has failed to inquire about some material fact that has not been disclosed, but which fact was within the knowledge of the party having such knowledge. As *Halsbury (supra)* had said, the duty is a positive obligation to disclose a material fact. The duty to disclose the use of the balance 55% of the premium rested with the defendants in this case. Until that duty is discharged by them, there is no duty on the plaintiff to even inquire about the same. The mere fact that

A the plaintiff may have occasion to inquire about the same but does not do so, does not diminish the duty imposed on the defendants to disclose, a single bit. That duty was squarely placed on the shoulders of the defendants and on them had lied the onus to discharge it. From the evidence of the SD2, the actuary who was part of the D1's team who had designed the Investpro policy, it was never the intention on the part of the D1 to disclose that fact about the use of the balance 55% of the Investpro policy to the 'investing' public. And in this regard, it is my finding that both the defendants had failed to discharge that onus and they had thereby occasioned an injustice to the plaintiff as a result thereof, in that he had been induced by the material non-disclosure to act to his detriment in purchasing the Investpro policy from the defendants.

[27] The effect of non-disclosure of a material fact in an insurance contract is the exactly the same as that of a misrepresentation and that is it gives justification for the aggrieved party to avoid the contract, was decided by the court in the case of *Asia Insurance Co Ltd v. Tat Hong Plant Leasing Pte Ltd* [1992] 1 CLJ 330; [1992] 4 CLJ (Rep) 324. From the above therefore, it was clearly established as a factual circumstance that the D2 did not disclose that material fact to the plaintiff in this case.

[28] It is my finding that the D2 knew that the plaintiff was relying on the D2's professional advice in deciding whether to purchase the policy. He was paid a hefty commission for doing that. In fact that commission had come from the balance 55% of the premium of the Investpro policy purchased by the plaintiff. It is in evidence and not disputed that D2 had, in the past, sold 3 Asia Life policies to the plaintiff and they had turned out to be successful investments for the plaintiff. In fact, as a successful insurance agent, D2 must have in all probabilities wanted the plaintiff to listen to his professional advice. In the context of the circumstances in this case, the D2 knew that the plaintiff was relying on his advice when he purchased the Investpro policy from the D1. Had there been no past links between them that concerned successful investments in the Asia Life policies, my above finding might not have been more readily arrived at as it had been.

[29] It is my finding that the plaintiff had acted on the misrepresentations made by the D2 and was induced into entering the contract to purchase the Investpro policy from the D1. Likewise, it is my finding that the misrepresentations and the non-disclosure as referred to in para. 1 in 'The issues to be tried' were material factors in the plaintiff's consideration before he finally decided to purchase the Invesptro policy from D1.

[30] From the appreciation of the available evidence, the defendants had deliberately failed to bring to the notice of the plaintiff that the balance 55% of the premium would go towards the alleged administration charges at the very onset of the purchase of the policy. Even from the agreed facts between the litigating parties as contained in bundle B, para 5 therein, it is clear that the use of the 55% of the premium fund was not a term that was expressly disclosed in the policy. The issue on the role of the Bank Negara Malaysia was not a pleaded case for the defendants and like any statutory defence, a litigant desirous of availing itself to it must expressly plead it. In this case, there was no such pleading advanced by neither the D1 nor D2 in answer to the plaintiff's claim. SD1, a manager in the customer relations department of D1, said in cross-examination that the use of the balance 55% of the premium in respect of the Investpro policy was a trade secret of the D1, a disclosure of which would compromise adversely on its competitive edge *vis-à-vis* its market rivals. But as rightly argued by the learned counsel for the plaintiff, the issue of trade secret was never part of the pleaded case for the defendants as well. The two belated 'defences' advanced by the defendants' witness(es) would smack of an afterthought on their part. Such evidence lacks inherent credibility to be taken seriously by this court. A perusal of the D2's witness statement (OTS) when he explained to the plaintiff about the Investpro policy would show that he did not disclose the fact about the use of the 55% of the balance of the premium, to the plaintiff. That would add credence to SD2's telling testimony that the D1 had never intended to inform the use of the balance 55% of the premium for the Investpro policy to the investing public. The evidence of the non-disclosure of the material fact concerning the use of the balance 55% of the premium paid for the Investpro policy to the plaintiff by the defendants was therefore overwhelming.

[31] It is my finding too, that in the circumstances of this case the plaintiff was not estopped from avoiding the said contract. From the evidence, nothing can be adversely attributed to the plaintiff such that he ought to be estopped from avoiding the Investpro contract. From the moment that he became aware of the true nature of the contract, he had taken positive steps to get clarifications on it and it was only after he failed to get an satisfactory explanation from the defendants that he had instructed his solicitors to write to the D1 to terminate the said contract. His legal rights under the circumstances, to avoid the Investpro policy had not been in any way compromised by his conduct upon him becoming aware of the true nature of the Investpro policy which he had purchased from the D1 through D2. There is nothing in the evidence led before this court that would have justified this court to rule otherwise. The plaintiff had done what he ought to do with respect to the policy. He had paid the premium in full. But as borne out by the evidence as led before this court, he was entitled to rescind it by reason of misrepresentation and material non-disclosure by the defendants. No estoppel ought to apply against the plaintiff.

[32] Having observed the demeanour of the two main protagonists in this case, I have found that the plaintiff had shown candour in his testimony before this court. I had found that he had been forthright in his answers during trial. On the other hand, I found that the D2 was rather evasive and at crucial times in the course of his evidence, he had been less than frank in his responses. I have not been impressed in a positive manner as a result thereof. As such, I had preferred the evidence of the plaintiff to that of the D2.

[33] Under the circumstances, it is my finding as a matter of fact as well as of law, that the plaintiff was entitled to avoid the Investpro policy contract. It is therefore my finding that the Investpro policy had been validly avoided by way of the letter from the plaintiff's solicitor dated 6 June 2006 to the D1.

[34] In conclusion, it is my considered view that the plaintiff had proven his case on the balance of probabilities. Both the defendants (D1 and D2), on the other hand, had not succeeded in establishing their case on the same legal threshold. In fact, both the misrepresentation and non-disclosure by the defendants as

proven above had breached the *uberrimae fides* requirements that imposed the attendant duty on them to be frank and truthful to the plaintiff.

[35] As such, I would therefore enter judgement in favour of the plaintiff and I allow the prayers as claimed by the plaintiff in terms, with general damages to be assessed before the Deputy Registrar. After hearing submissions on costs, I had ordered that the both the defendants pay costs of RM60,000 to the plaintiff.